STATE OF MICHIGAN

COURT OF APPEALS

RONALD DICICCO and CARRIE DICICCO, Plaintiffs-Appellants,	UNPUBLISHED March 1, 2002
v	No. 222751 Wayne Circuit Court
CITY OF GROSSE POINTE WOODS, Defendant-Appellee.	LC No. 98-810457-AA

ROLAND BERNARDI and CAROL BERNARDI, Plaintiffs-Counterdefendants-Appellees,	
v	No. 222998 Wayne Circuit Court
RONALD DICICCO, Defendant-Counterplaintiff-Appellant,	LC No. 97-735731-NZ
and	
CITY OF GROSSE POINTE WOODS and MELISSA SPRANGER, Defendants.	

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

In these consolidated cases, defendant Ronald DiCicco appeals as of right in Docket No. 222998 from the circuit court's order granting partial summary disposition to plaintiffs, denying DiCicco's motion for summary disposition, and from the court's subsequent order denying a second motion for summary disposition filed by DiCicco. In Docket No. 222751, plaintiffs Ronald DiCicco and Carrie DiCicco appeal on leave granted from the circuit court's judgment affirming the variance denial made by the zoning board of appeals for defendant City of Grosse

Pointe Woods. We affirm the circuit court's orders on the motions for summary disposition in Docket No. 222998, and in Docket No. 222751, we reverse the court's judgment affirming the decision of the zoning board of appeals and remand to the zoning board for further proceedings and a fuller explanation of the facts and reasoning by which the DiCiccos failed to qualify for a variance under the standards set forth in Grosse Pointe Woods Ordinance, § 98-408(c)(5).

I

In Docket No. 222998, the Bernardis filed suit to enjoin the construction of a house by Ronald DiCicco on the grounds that DiCicco's lot was not a buildable lot because it did not meet the sixty-foot minimum width requirement of Grosse Pointe Woods Ordinance, § 98-73(f), which was adopted in 1975. The Bernardis also added a claim for money damages against DiCicco for damages allegedly caused to the Bernardis' property by the excavation of DiCicco's basement. The Bernardis further named as defendants the city and Melissa Spranger, the chief building inspector, because a building permit had been issued to DiCicco allowing construction of the house, and the Bernardis sought a writ of mandamus compelling defendants city and Spranger to revoke the permit.

DiCicco asserted that the lot was not required to meet the width requirement because the property was covered by a "grandfather" clause contained in Grosse Pointe Woods Ordinance, § 98-73(a), which, in essence, provided that if the lot was a lot of record in 1975, the lot would not be subject to the sixty-foot width requirement.

After the circuit court entered a temporary restraining order halting construction of the house, the Bernardis and DiCicco filed motions for summary disposition pursuant to MCR 2.116(C)(8) and (10) concerning the "lot of record" issue, and the Bernardis and defendants city and Spranger filed motions for summary disposition pursuant to MCR 2.116(C)(8) and (10) concerning whether a writ of mandamus was appropriate. The circuit court granted the Bernardis' motion for summary disposition finding that DiCicco's lot was not a lot of record, and therefore, DiCicco's lot was required to be sixty feet in width in order to construct a house, and the court entered a permanent injunction against further construction. On the motions regarding the writ of mandamus, the circuit court ruled that it was not necessary for it to address the issue whether the building permit should be revoked because of its decision granting a permanent injunction.

DiCicco filed a delayed application for leave to appeal the circuit court's decision regarding the motions for summary disposition on the permanent injunction issue, and specifically the court's finding that the lot was not a lot of record in 1975. On February 23, 1999, this Court denied the application "for lack of merit in the grounds presented" in Docket No. 213470.

While DiCicco's delayed application for leave to appeal was pending, a hearing was held on a second motion for summary disposition filed by DiCicco, in which DiCicco argued that the mandamus action should be dismissed for failure to exhaust administrative remedies available through the zoning board of appeals. The circuit court denied the motion. Defendants city and Spranger were dismissed by stipulation of the parties. Subsequently, a stipulated order to dismiss the remaining claims for money damages, including DiCicco's counterclaim, was entered from which DiCicco filed this appeal as of right challenging the lot of record

determination by the circuit court and the denial of the motion for summary disposition on the exhaustion of administrative remedies issue.

After the circuit court had granted the permanent injunction with its order granting, in part, the Bernardis' motion for summary disposition, the DiCiccos went to the zoning board of appeals for defendant city seeking a variance from the width requirement, and the board rejected the variance request. The circuit court affirmed and defendant appeals that decision in Docket No. 222751.

II

DiCicco first contends that the circuit court erred in granting the permanent injunction and the Bernardis' motion for summary disposition on the basis that the lot was not a lot of record, as defined in Grosse Pointe Woods Ordinance, § 98-1, in 1975. In this regard, we first address the Bernardis' assertion that the law of the case doctrine precludes DiCicco from rearguing the "lot of record" issue. We agree with the Bernardis.

In *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), our Supreme Court stated:

> Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 465; 97 NW2d 1 (1959). Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997); see, generally, 5 Am Jur 2d, Appellate Review, § 605, p 300.

The *Grievance Administrator* Court addressed the law of the case doctrine in the context of a claim that the denial of an application for leave to appeal constituted the law of the case, and our Supreme Court held that the doctrine applied to issues actually decided, either implicitly or explicitly, in the prior appeal. *Grievance Administrator, supra* at 260. Our Supreme Court concluded that the law of the case doctrine did not apply in the case before it because in denying the application for leave to appeal, the Court expressed no opinion on the merits. *Id.*

In *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 338-339; 425 NW2d 791 (1988), this Court, addressing similar language contained in an order denying an application for leave, stated:

> Initially, we must address plaintiff's claim that defendant's appeal is barred by the law of the case. Plaintiff claims that this Court's July 2, 1986, denial of defendant's application for leave to appeal "for lack of merit in the grounds presented" bars the reraising of this issue.

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> The only issue raised in defendant's previous application was whether she should have had an appeal as of right; no substantive challenge to the award of exemplary damages was presented. Because this Court did not previously decide the issue of the propriety of the jury instructions on the merits, the doctrine of the law of the case does not preclude defendant's appeal.

This Court's denial of DiCicco's delayed application for leave to appeal indicated that it was denied "for lack of merit in the grounds presented." Therefore, because this Court expressed an opinion on the merits of DiCicco's arguments in denying the application for leave in Docket No. 213470, the law of the case doctrine precludes this Court from readdressing the arguments. In Docket No. 213470, DiCicco raised the same issues as currently presented regarding the granting of the Bernardis' motion for summary disposition concerning the permanent injunction; DiCicco claimed that the lot was a lot of record in 1975 and should not be subject to the sixty-foot width requirement. There have been no factual changes since DiCicco's original filing of the delayed application for leave to appeal. Further, we note that DiCicco's lot was not a lot of record when the ordinance was adopted, although the lot width was of record. While DiCicco's argument, focusing on the nonconforming dimension being of record, as opposed to the lot, is reasonable, it is not the approach taken by the ordinance by its terms. Similarly, the approach of the building official, while reasonable, is undermined by the terms of the ordinance. The zoning board of appeals is, of course, free to take the fact that while the lot was not of record when the ordinance was adopted, the non-conforming dimension was, into consideration in determining whether a variance is appropriate on remand. See section III, *infra.*

The remaining issue in Docket No. 222998 is DiCicco's argument regarding exhaustion of administrative remedies. This argument was not the subject of the delayed application for leave to appeal in Docket No. 213470, and is properly before us.

DiCicco's argument specifically maintains that the Bernardis lacked standing to file an action seeking a writ of mandamus because they failed to exhaust their administrative remedies available through various ordinances. However, the mandamus count of the Bernardis' complaint sought a writ of mandamus compelling defendants city and Spranger to revoke the previously issued building permit. The mandamus count pertained to defendants city and Spranger, and not DiCicco, and those defendants were dismissed pursuant to stipulated orders that are not being challenged.

III

The DiCiccos contend that the circuit court erred in affirming the zoning board of appeals' decision to deny the variance request. Because in the present case a city is involved, MCL 125.585(11) is applicable, which statute dictates that the record shall be reviewed to insure that the decision by the zoning board: (a) complies with the constitution and laws of Michigan; (b) is based on proper procedure; (c) is supported by competent, material, and substantial evidence on the record; and (d) represents the reasonable exercise of discretion granted by law to the board of appeals.

Grosse Pointe Woods Ordinance, § 98-408, regards variances and provides, in pertinent part:

> (c) The board of appeals may, in specific cases and subject to appropriate conditions and safeguards, determine and vary the application of the regulations established in this chapter in harmony with their general purpose and intent, as follows:
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> (5) Permit variations in the requirements for outer courts in dwellings, and permit such variation or modification of yard, lot area, and percentage of lot coverage requirements of this chapter as may be necessary to secure an appropriate improvement of a parcel of land which is of size, shape or dimension, or which has such peculiar or exceptional geographical or topographical conditions, that it cannot be appropriately improved without such variation or modification, provided that the purpose and spirit of this chapter shall be observed, public safety secured and substantial justice done.
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> (13) The board of appeals may, in specific cases and subject to appropriate conditions and safeguards, determine and vary the application of the regulations established in this chapter upon written application when undue hardship or practical difficulty is found by a majority of the board of appeals.

In *Reenders v Parker*, 217 Mich App 373, 378-379; 551 NW2d 474 (1996), this Court, addressing the process by which a zoning board of appeals must render variance decisions, stated:

> Meaningful judicial review of whether there was competent, material, and substantial evidence on the record to support a zoning board decision requires "a knowledge of the facts justifying the board's . . . conclusion." *Tireman-Joy-Chicago Improvement Ass'n v Chernick*, 361 Mich 211, 219; 105 NW2d 57 (1960). Accordingly, "the board of zoning appeals must state the grounds upon which it justifies the granting of a variance." *Id.* It is insufficient for the zoning board to merely repeat the conclusory language of the zoning ordinance without specifying the factual findings underlying the determination that the requirements of the ordinance were satisfied in the case at hand. *Badanek v Schroskey*, 21 Mich App 582, 584-585; 175 NW2d 784 (1970). [Ellipsis in original.]

The minutes from the hearing before the zoning board of appeals indicated that besides denying the variance request by a seven to zero vote, there were no direct factual findings, but simply brief comments by two of the board members. No other board members spoke as to their position on the issue other than to vote against the variance request. The circuit court's ruling on appeal was more a de novo review, with the court making its own findings of fact as opposed to reviewing findings of the zoning board of appeals. There were no specific findings regarding whether the lot could be appropriately improved without a variance and whether the granting of

the variance would be violative of the purpose and spirit of the zoning ordinances, threaten public safety, and create a substantial injustice. There were insufficient factual findings by the board, as required under *Reenders,* identifying and explaining the basis and reasoning for the denial, which would allow us to partake in meaningful judicial review.

We affirm the circuit court's orders on the motions for summary disposition in Docket No. 222998, and in Docket No. 222751, we reverse the court's judgment affirming the decision of the zoning board of appeals and remand to the circuit court with directions to remand to the zoning board for further proceedings and a fuller explanation of the facts and reasoning by which it concluded that the DiCiccos failed to qualify for a variance under the standards set forth in Grosse Pointe Woods Ordinance, § 98-408(c)(5). We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White